IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE; TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

DEFENDANT SHERIFF WARREN'S
BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

COMES NOW, Defendant Sheriff David Warren (the "Sheriff" or "Sheriff Warren"), who has been sued in his official capacity as Sheriff of Macon County, Alabama, and submits this brief in support of his Motion to Dismiss Plaintiffs' First Amended Complaint for Injunctive Relief and Declaratory Judgment ("First Amended Complaint"). Defendant Sheriff Warren adopts and incorporates by reference his Brief in Support of Motion to Dismiss filed on April 3, 2006 as if set forth in its entirety. With regards to the specific allegations raised in Plaintiffs' First Amended Complaint, Defendant Warren states as follows:

FACTUAL BACKGROUND

Sheriff Warren adopts the "Factual Background" set forth in his Brief dated April 3, 2006. In addition, Sheriff Warren submits the facts set forth hereinbelow.

The Sheriff promulgated the "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" in December of 2003 ("2003 Rules"). On June 2, 2004, the Sheriff amended the 2003 Rules and issued the First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County ("2004 Amendments"). The basis for the 2004 amendments is set forth in a detailed commentary published along with the 2004 amendments. On January 1, 2005, the Sheriff again amended the rules for the licensing and conduct of bingo games and issued the Second Amended and Restated Bingo Regulations ("2005 Amendments"). (First Amended Comp. at ¶ 13.) The Sheriff set forth the basis for those amendments in a detailed commentary published along with the 2005 Amendments.

Plaintiff Macon County Investments, Inc. ("MCII") was formed and incorporated on June 2, 2005. (First Amended Comp. at Ex. 4.)[1] Plaintiff MCII is a for-profit organization "doing business in Macon County as a real estate development company." (First Amended Comp. at ¶ 2.) MCII filed its Articles of Incorporation with the Macon County Judge of Probate on July 14, 2005. (*Id.* at Ex. 4.) Six days later, on July 25, 2005, Plaintiff Reach One, Teach One ("Reach One") applied for a Class B bingo license and designated Plaintiff MCII as its "qualified location." (Comp. at ¶ 15.) There is no physical structure at described property. Plaintiff MCII was formed, and Plaintiff Reach One's application was filed, six months after the Sheriff issued the 2005 Amendments to the 2003 Rules.

ARGUMENT

I. PLAINTIFF MCII IS DUE TO BE DISMISSED FOR LACK OF STANDING.

[1] Plaintiffs attached the application that was delivered to the Sheriff's Office for a Class B Bingo license as an Exhibit to their Complaint. (First Amended Comp. at Ex. 4).

Sheriff Warren's Motion to Dismiss is due to be granted with respect to MCII because MCII lacks standing to pursue this action. A necessary element of Article III's "case or controversy" requirement is that a plaintiff, "*based upon their complaint*, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997)(emphasis added). The Eleventh Circuit Court of Appeals has held that "standing is a doctrine that 'stems directly from Article III's 'case or controversy' requirement,' and thus it implicates" a district court's subject matter jurisdiction. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964 (11th Cir. 2005)(quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Circ. 2003)). The Eleventh Circuit has also recognized that "standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claim." *Bochese v. Town of Ponce Inlet*, 405 F.3d at 974 (internal quotations and citations omitted). "The focus of the standing inquiry is 'whether the plaintiff is the proper party to bring this suit'." *Id*. at 981 (quoting *Raines*, 521 U.S. at 818). In order to establish standing, a plaintiff must show that: (1) he has suffered an injury in fact or an invasion of a legally protected interest which is concrete and particularized; (2) there must be a causal connection between the injury and the conduct complained of that is fairly traceable to the action of the defendant; and (3) likely that the injury will be redressed by a favorable decision of the court. *Id.* at 980.

In their First Amended Complaint filed on June 28, 2006, Plaintiffs allege that Reach One and MCII jointly applied for a Class B bingo license with Sheriff Warren. However, the face of the application shows that only Plaintiff Reach One applied for a license. Therefore, Plaintiff MCII appears to assert that it has a legal right or interest in this action by virtue of the fact that Plaintiff Reach One applied for a Class B bingo license. However, it is well settled law that "'a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'." *Id.* at 984 (quoting Warth, 422 U.S. at _______). Plaintiff MCII has not and cannot establish an independent legal right or interest in this case. MCII also fails to assert that it has suffered an injury in fact or that any hypothetical injury could be redressed by this Court.

Plaintiffs allege that both Reach One and MCII applied for a Class B bingo license and that they would both be entitled to a Class B bingo license if they prevail. However, Amendment No. 744 and the Macon County Bingo Rules provide for the licensing of a nonprofit organization for the conduct of bingo pursuant to a Class B bingo license. Neither Amendment No. 744 nor the Macon County Bingo Rules provide for the licensing of a for profit organization, such as MCII, to conduct bingo pursuant to a Class B bingo license. Specifically, Amendment No. 744 provides: "The operation of bingo games for prizes or money by *nonprofit* organizations for charitable, educational, or other lawful purposes shall be legal in Macon County." (emphasis provided).

Pursuant to Amendment No. 744, Sheriff Warren promulgated The Rules and Regulations for the Conduct of Bingo in Macon County, Alabama (2003 Rules). Section 3 of the 2003 Rules provides that: "No nonprofit organization, as defined herein, shall be allowed to operate a bingo game unless the Sheriff first issues a license to said organization authorizing it to do so." A "nonprofit organization" is defined in Section 1(d) as: "a bona fide organization for charitable, educational, or other lawful purposes which operates without profit to its members and/or which has been classified by the Internal Revenue Service as a tax exempt organization."

Plaintiffs admit in paragraph 2 of their original Complaint and the First Amended

Complaint that MCII is a "for-profit organization incorporated under the laws of the State of Alabama and doing business in Macon County as a real estate development company." (First Amended Comp. at ¶ 2.) Based upon its status as a for-profit business, MCII is not eligible to apply for or be issued a Class B bingo license.[2]

Moreover, Exhibit 4 to Plaintiffs' First Amended Complaint clearly shows that Reach One is the only one of the two Plaintiffs that submitted an application for a Class B bingo license. The application is completed in the name of Reach One; lists the name and address of Reach One's Executive Director; certifies that Reach One is a tax-exempt organization; and provides Reach One's tax identification number. MCII's name, officers, tax status, and tax identification number are not listed on first page of the application which identifies the nonprofit organization applying for the license[3]. Therefore, MCII did not apply for a Class B bingo license and, consequently, does not have a legally protected interest that Sheriff Warren could have invaded.

Finally, even if this Court were to find that MCII had standing, MCII's hypothetical injury would not be redressable by this Court. Plaintiffs ask this Court to roll back, invalidate or strike certain amendments to the Macon County Bingo Rules and award Reach One a Class B bingo license. However, Plaintiffs would still not be eligible for a Class B bingo license. Specifically, Reach One's application package lacks satisfactory evidence of: (1) public liability insurance of at least $5,000,000.00; (2) if liquor is served, liquor liability insurance of at least $1,000,000.00; (3) adequate parking for patrons and employees; (4) onsite security as prescribed by the Sheriff; (5) onsite first aid personnel as prescribed by the Sheriff; (6) accounting procedures, controls and security monitoring necessary to preserve and promote the operation of the bingo games and to ensure the protection of the charitable license holder and its patrons; (7) satisfactory evidence that the owner or owners of the location paid at least $5,000,000.00 for the land, building and other capital improvements comprising said location; and (8) satisfactory evidence that the location is fully compliant with the ADA. Therefore, this Court could possibly award Reach One and MCII all the relief they request and the Plaintiffs would still not be entitled to a Class B bingo license. Thus it is not likely that the alleged injury claimed by Plaintiffs would be "redressable by a favorable decision." *Bochese v. Town of Ponce Inlet*, 405 F.3d at 980(internal quotations omitted). Accordingly, MCII does not have standing to challenge the grant or denial of Plaintiff Reach One's application for a Class B bingo license.

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[2]Amendment No. 744 does permit a nonprofit organization to contract with another entity to operate the games. However, only Plaintiff Reach One applied and could possibly be eligible to obtain a Class B bingo License (assuming that Plaintiff Reach One met the qualifications).

[3]Information about MCII and its officers and directors is included elsewhere in the application packet, but only to the extent that Reach One represents that it has contracted with MCII to operate bingo games on Reach One's behalf.

II. PLAINTIFFS' FIRST AMENDED COMPLAINT IS DUE TO BE DISMISSED IN ITS ENTIRETY FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Next, Plaintiffs' First Amended Complaint is due to be dismissed in its entirety on two grounds. First, Plaintiffs' Complaint is due to be dismissed for lack of subject matter jurisdiction because: (1) the Plaintiffs' claim is not yet ripe; and (2) the case is moot. Second, Plaintiffs' Complaint is due to be dismissed pursuant to *Fed. R. Civ. P.* 12(b)(6) because it fails to state a claim upon which relief can be granted. Specifically, Plaintiffs' Complaint fails to demonstrate that the 2004 and 2005 Amendments to the Bingo Rules are not rationally related to a legitimate government interest and they fail to demonstrate that Sheriff Warren's actions were triggered by a discriminatory motive or purpose. These grounds were presented in Sheriff Warren's Brief in Support of Motion to Dismiss filed on April 3, 2006. Sheriff Warren adopts and incorporates by reference the Brief in Support of Motion to Dismiss he filed on April 3, 2006.

WHEREFORE, the premises considered, the Defendant Sheriff David Warren moves this Honorable Court to dismiss the Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

s/Fred D. Gray, Jr.
One of the Attorneys for Defendant,
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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth L. Thomas, Esq.
Ramadanah M. Salaam, Esq.
Gary A. Grasso, Esq.
Adam R. Bowers, Esq.
John M. Bolton, III, Esq.
Charlanna Spencer, Esq.

And I certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

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